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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 663

Case No. 677: MANIRAKIZA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas at the request of Marc Manirakiza, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 May, and 30 June 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 30 June 1992, the Applicant filed an application requesting the Tribunal, inter alia:

"...to order the Secretary-General:

(c) To grant to the Applicant a fixed-term appointment until 31 December 1997, at the D-2 level, against a post with assigned functions;

(d) To pay to the Applicant the difference between the salary he received at the D-1 level and the salary and other benefits at the D-2 level he would have received had he remained at the D-2 level;

(e) To pay to the Applicant compensation for the denial of his rights resulting in the complete disruption of his U.N. career and for the moral, emotional, physical and financial suffering inflicted upor him and his family, in an amount to be determined by the Administrative Tribunal."

Whereas on 12 August 1993, the Applicant submitted an additional document;

Whereas the Respondent filed his answer on 28 October 1993;

Whereas the Applicant filed written observations on 14 December 1993, in which he requested the Tribunal:

> "to order ... payment of interest [on any amount awarded to him by the Tribunal] for the period from 2 August 1992 until the date of the Tribunal's judgement."
>
> and
>
> "...to award him appropriate compensation [for allowing the] Applicant's fixed-term appointment to expire, without an extension, prior to any consideration of his case by the Administrative Tribunal."

Whereas, on 22 June 1994, the Tribunal put questions to the Respondent, to which he provided answers on 5 July 1994;

Whereas, on 8 July 1994, the Applicant submitted his comments thereon;

Whereas the facts in the case are as follows:

The Applicant, a national of Burundi, entered the service of the United Nations on 5 March 1980, on a two year fixed-term appointment, at the D-2, step 1 level, as Deputy Executive Secretary of the Economic Commission for Africa (ECA) in Addis Ababa.

On several occasions during 1981, and during the early part of 1982, the Government of Burundi asked the Secretary-General, as well as the Executive Secretary of ECA, not to extend the Applicant's appointment, on the ground that the Applicant's services were required by his Government.

On 25 February 1982, the Permanent Representative of Burundi to the United Nations wrote to the Secretary-General, advising him that, as the Applicant was on secondment from his Government, which

had decided to entrust him with new responsibilities, ECA could not keep him in UN service without prior approval from his Government.

In a reply dated 26 February 1982, the Secretary-General informed the Permanent Representative of Burundi to the UN that the Applicant was serving under a fixed-term appointment which, in accordance with the Staff Rules, could be extended at the Secretary-General's discretion. The Executive Secretary of ECA had requested an extension of the Applicant's appointment. The Secretary-General noted in his reply that the Applicant was free to resign and to accept new responsibilities with his Government, if he should wish to do so, but that the Applicant's appointment could not be terminated without his consent.

The Applicant's fixed-term appointment was extended for one year, with effect from 5 March 1982.

On 22 March 1982, the Permanent Representative of Burundi to the UN wrote to the Secretary-General, informing him that the Applicant was the author of a document which, in his view, was of a political nature and was directed against the Government of Burundi, in violation of the Applicant's obligations under staff regulations 1.4 and 1.7 and staff rule 101.6.

In a legal opinion dated 25 March 1982, the Legal Counsel informed the Secretary-General that, in his view, the document referred to did not contain any remarks that were insulting to the Government of Burundi. He noted, however, that the Applicant had shown "a lack of judgement" concerning his obligations as an international civil servant, in drafting and distributing the document. As the document had not been published, the Applicant had not violated staff rule 101.6.

On 2 April 1982, the Chef de Cabinet of the Secretary-General advised the Permanent Representative of Burundi to the UN of the Legal Counsel's conclusions.

On 11 February 1983, the Applicant asked the Assistant Secretary-General for Personnel Services to investigate certain allegations which had been made against him by the Government of

Burundi. He also stated that his wife had been detained by the authorities of Burundi for three months, without explanation, and was unable to leave the country.

When the question of renewal of the Applicant's contract arose in February 1983, the Secretary-General decided, after consultations with the Executive Secretary of ECA, that in the interest of the Organization, the post of Deputy Executive Secretary should be declared vacant and advertised, and that the Applicant's contract should be extended through 31 May 1983. In a communication of this decision, to the Assistant Secretary-General for Personnel Services, dated 18 February 1983, the Executive Assistant to the Secretary-General noted:

> "...
>
> The Secretary-General would appreciate it if you would kindly explain his decisions to the Permanent Representative of Burundi. At the same time please take the necessary actions to extend [the Applicant's] contract and immediately circulate the vacancy notice...".

The Applicant's contract was extended until 31 May 1983.

At the beginning of May 1983, the Assistant Secretary-General for Personnel Services decided that the Applicant's appointment should be extended for a further fixed-term period of two months and 26 days, in order to find him a suitable position at a different duty station. On 16 May 1983, the Assistant Secretary-General for Personnel Services asked the Applicant to travel to New York for consultations regarding his future employment. The Applicant's appointment was then extended through 31 July 1983.

In July 1983, the Secretary-General decided to appoint a panel of three senior UN officials to investigate the Applicant's conduct. On 28 October 1983, the Panel submitted a report in which it concluded that the Applicant had not infringed the Staff Regulations or Rules or the Standards of Conduct of the International Civil Service.

On 1 August 1983, the Applicant's appointment was extended for a further five months, through 31 December 1983, as Director, Department of Administration and Management in New York.

On 28 November 1983, the President of the UN Staff Committee wrote to the Secretary-General as follows:

> "...that the post in the Economic Commission, against which [the Applicant] is charged, was loaned to Headquarters for the period 1 August to 31 December 1983. That same post has now been advertised as vacant. Pending a positive outcome of the attempts to place him in the Secretariat I would like to request that the post of Deputy Executive Secretary in ECA be blocked so that [the Applicant] is assured of no change in his contractual status pending a final resolution of the problem."

The Applicant was then given a project personnel appointment at the L-7, step II level, with effect from 1 January 1984, for a fixed-term of one year, as Director of a project in Thailand. This appointment was extended for a further year, with effect from 1 January 1985.

On 21 March and again on 1 October 1985, the Applicant wrote to the Under-Secretary-General for Administration and Management, reminding him of a promise that a more permanent position would be found at the end of his present assignment in December 1985.

On 19 December 1986, the Under-Secretary-General for Administration and Management advised the Applicant as follows:

> "The United Nations will continue your employment for a further period of one year, to 31 December 1987. For that purpose, a letter of appointment for a fixed-term of one year, from 1 January to 31 December 1987, will be issued. The level of Appointment will be either D-1 or L-7, depending on the functions assigned. Your duty station will be New York, and you will be expected to report for duty on or around 1 February 1987. [The Executive Officer] will be in touch with you for the details. The period to 31 January 1987, will be considered as leave with pay.
>
> A fixed-term appointment does not carry any expectation of renewal, but conversely does not exclude the possibility of renewal. A decision on whether or not to renew your

appointment will be taken in 1987, in due time, in the light of the needs of the Organization."

On the same date, the Applicant responded, regretting that the commitment was only for one year and that the level had been downgraded from D-2 to D-1 or L-7, "which carries with it the connotation of a demotion as if I am being penalized."

Subsequently, the Applicant accepted, with effect from 1 January 1986, a fixed-term appointment of two years and six months, expiring on 30 June 1988. He was assigned from the Department of Administration and Management to UNITAR, as a Principal Officer, for the period from 15 May 1987 until 30 June 1988.

The Applicant's fixed-term appointment was then extended four times, through 31 August 1988, through 31 December 1989, through 31 December 1991 and through 31 December 1993, as Principal Officer, Department of Administration and Management, Office of Programme Planning and Budget Division.

On 31 January 1991, the Applicant wrote to the Assistant Secretary-General for Human Resources Management[1], requesting that his employment be regularized.

On 4 March 1991, the Applicant requested a review by the Secretary-General of the "implicit administrative decision by omission [not] to correct and regularize [his] work situation." Having received no reply, on 5 April 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 13 November 1991. Its considerations and recommendations read, in part, as follows:

"Considerations and recommendations

...

31. The Panel was of the view that the Appellant is entitled to be considered for placement against a budgetary

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[1] Successor of the Office for Personnel Services.

post with defined functions and a job description in the light of the promise given to him by the Secretary-General and the foregoing considerations. The Panel did not accept the position taken by the Respondent that 'the undertaking referred to relates only to the re-integration of the appellant into the UN system...' which actually led to the unsatisfactory current situation.

Recommendations

32. The Panel unanimously recommends that, without further delay, the Appellant be considered for a post with assigned functions which would permit the Appellant to contribute to the work of the United Nations and demonstrate his abilities, one which would carry with it reasonable career expectations. This post should be searched for throughout the Secretariat and ideally should be one where the administrative capacities of the Appellant could be used effectively."

On 19 November 1991, the Director, Office of the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"... The Secretary-General regrets that the efforts made so far have not been successful in placing you on a post with defined functions. While he shares the Board's view in paragraph 31 of its report concerning your right to consideration for placement on a post with defined functions, such post may be one financed from the regular budget or from other sources. It should be noted in this connection that, under staff regulation 1.2, the Secretary-General may assign a staff member to any of the activities or offices of the United Nations. Accordingly, the Secretary-General has decided that you should be considered for assignment to the functions of a post commensurate with your level and capabilities and that an extensive search be undertaken for this purpose."

On 30 June 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's rights have been violated as he has been a staff member of the United Nations for over twelve years and none of the consecutive fixed-term appointments granted to him have

carried any assurance of continued employment. After 1 January 1986, his letters of appointment have even failed to specify his functions.

2. The Applicant was downgraded to the D-1 level, with effect from 1 January 1986, although no disciplinary action has ever been taken against him.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeal, in so far as it relates to assignments occurring before the appeal made on 4 March 1991, is time-barred, pursuant to staff rule 111.2. The JAB has no authority to waive that time-limit.

2. The Organization has been unable for many years to place the Applicant. The past renewals of his appointment, despite the lack of any real work, do not give the Applicant a right to their continued renewal until retirement age.

The Tribunal, having deliberated from 21 June to 22 July 1994, now pronounces the following judgement:

I. This is an appeal from a decision of the Secretary-General, dated 19 November 1991, in which the Secretary-General adopted, in essence, the recommendation of the JAB that the Applicant be considered for assignment to a post commensurate with his level and capabilities and that an extensive search be undertaken for that purpose. In reaching his decision, the Secretary-General stated that he shared the JAB's view, in paragraph 31 of its report, concerning the Applicant's right to consideration for placement in a post with defined functions. Paragraph 31 of the JAB report states:

> "The Panel was of the view that the Appellant is entitled to be considered for placement against a budgetary post with defined functions and a job description in the

> light of the promise given to him by the Secretary-General and the aforegoing considerations."

The only aspect of the above quoted JAB view with which the Secretary-General was not in accord pertains to whether the Applicant's entitlement to a post was limited to a post financed from the regular budget.

II. Following the Secretary-General's decision of 19 November 1991, inquiries were made aimed at finding an appropriate post to which the Applicant could be assigned, but these failed to lead to an assignment. Upon the expiration of the Applicant's last fixed-term appointment on 31 December 1993, he was separated from the Organization. In his pleas, the Applicant asks preliminarily that the Respondent explain "why the Applicant was demoted and left 'floating' without assigned functions since January 1986;" and that the Respondent explain "why Applicant has not been reinstated in his former post as Deputy Executive Secretary of the UN Economic Commission for Africa (ECA)." On the merits, the Applicant asks the Tribunal to order the Secretary-General to accede to his pleas which are quoted above.

III. The Respondent's position before the Tribunal is that virtually everything about which the Applicant complains and which led to his predicament occurred long before he invoked the appeals procedure under the Staff Rules by seeking, on 4 March 1991, a review by the Secretary-General of an "implicit administrative decision by omission to correct and regularize my work situation." Previously, on 31 January 1991, the Applicant had written to the Assistant Secretary-General, OHRM, requesting that the Applicant's situation be regularized, but the Applicant received no response to this request. The Respondent also asserted before the JAB that the substance of the Applicant's claims were time barred and that only challenges to administrative decisions occurring within 60 days of the Applicant's request for review, on 4 March 1991, were within

the competence of the JAB. The Respondent maintains this same position with respect to the receivability of the Applicant's appeal insofar as it relates to assignments occurring more than 60 days before 4 March 1991.

IV. The JAB concurred with the Respondent's timeliness contentions with respect to the decision taken in 1983, to remove the Applicant from the post in ECA, and the decision in 1987, which had the effect of lowering the Applicant's grade from D-2 to D-1. Neither of these decisions was appealed by the Applicant in a timely fashion. The Tribunal agrees with the JAB.

V. However, with respect to another aspect of the Applicant's case, namely the action of the Administration which had kept the Applicant in a "floating" position since 1983, the JAB took the view that the problem was continuing in nature and therefore within its competence. One reason for the JAB's view was the undisputed existence of a promise on the part of the then Secretary-General that the Applicant would be reinstated in an equivalent position if an investigation of allegations relating to the removal of the Applicant from his post as Deputy Executive Secretary of ECA were determined to be unfounded. They were so determined, but the Applicant was left for years in the anomalous position of being retained at the D-2 and subsequently at the D-1 level, under a series of fixed-term contracts but, with the exception of a relatively short period, having no regular assignment. Indeed, the Respondent has admitted that for a lengthy period of time the Applicant was paid by the Organization although he had no defined functions, and that his treatment was not in the interests of the Organization.

VI. The Tribunal has considered the untimeliness arguments advanced by the Respondent and, except as indicated above, declines to accept them. In the view of the Tribunal, the decision of the Secretary-General dated 19 November 1991 had the effect of waiving

any contention of untimeliness with respect to the basis for the JAB recommendation which appears in paragraph 31 of its report and which the Secretary-General stated that he shared. Having then adopted, in essence, the ensuing recommendation in paragraph 32 of the JAB report, the Secretary-General must be taken to have abandoned any possible contention of untimeliness with regard to the underpinning for his own decision. If the Secretary-General wished to adopt the position now being urged by the Respondent with regard to untimeliness, this should have been made clear in the decision itself. The propriety of such an exercise of discretion would have been reviewable by the Tribunal as indicated in Judgement No. 527, Han (1991). But for the Respondent's counsel to urge untimeliness in the face of the Respondent's decision is an inconsistency which the Tribunal cannot sustain. Hence, the Tribunal will examine the implementation of the Respondent's decision dated 19 November 1991 and, for background purposes, take into account events occurring more than 60 days prior to 4 March 1991. It will only do so consistent with the approach taken by the JAB, which was evidently found acceptable by the Respondent.

VII. At the outset, the Tribunal must record its surprise at the state of affairs disclosed by this case. The Tribunal notes that the Secretary-General who originally appointed the Applicant, directly and without competition, to the position of Deputy Executive Secretary of ECA and the Secretary-General who removed the Applicant from that position are no longer associated with the Organization. From the evidence before the Tribunal, it appears that the former did so in response to efforts supportive of the Applicant by his government, and the latter did so in response to representations by a successor government which was hostile to the Applicant. It also appears that the Applicant was qualified for the post of Deputy Executive Secretary, ECA, and that, while he held the post, he performed its duties satisfactorily. Despite his qualifications, after his removal from the post in 1983, he was, with perhaps one exception, given a series of meaningless

assignments with no work to do for long periods of time. The Applicant candidly admits that he reported regularly, was paid, used other people's offices as an accommodation, did no work for the UN, read newspapers, and did personal work or writing. Efforts were made from time to time by the Applicant or by the Staff Union to change this state of affairs and place him in a meaningful assignment. But, except as noted above, these efforts did not bear fruit.

It is not the function of the Tribunal to judge the managerial practices within the Organization and it will not do so. That is a responsibility of the Secretary-General and, of course, the General Assembly. Nor is it for the Tribunal, in the first instance, to approve or fix the blame for any staff member collecting pay from the Organization for doing nothing. It is within the province of the Administration for such action, if any, as may be appropriate under Financial Rule 114.1, staff rules 110 and 112.3, or both, or in the performance evaluation reports of those responsible, subject to possible review by the Tribunal. What is now properly for consideration by the Tribunal in this case is whether there has been good faith implementation of a decision by the Secretary-General, accepting a JAB recommendation. The latter was based on a finding that the Applicant had been treated unfairly by the Administration, which deprived him of the possibility to establish his value to the Organization by not giving him meaningful assignments.

VIII. Some evidence was presented to the Tribunal by the Respondent indicating efforts on his part to implement the 19 November 1991 decision. This evidence consisted of letters from the Assistant Secretary-General, OHRM, to officials who might have been able to place the Applicant in a meaningful post, and a letter to the Director, Recruitment and Placement Division, OHRM, from the Director, Staff Administration and Training Division, with the same objective. There was also a letter dated 6 August 1993, from the Director of Personnel which, without referring to the 19 November

1991 decision, included the Applicant's name on a list of 12 staff members who might be considered for additional professional posts in Peace-Keeping Operations. However, the record before the Tribunal does not disclose any written responses indicating the consideration, if any, given to the Applicant, or to the 19 November 1991 decision, and the reasons, if any, for his non-selection. The Tribunal is unable to conclude that there was good faith implementation of the Secretary-General's decision.

IX. This view is strengthened by apparent lack of merit in the Respondent's claim that, with one exception, the Applicant did not seek to be considered for any vacancies between 1990 and 1993. The Applicant has submitted evidence to the contrary, and this impugns the Respondent's claim. Moreover, the Tribunal considers that the import of the 19 November 1991 decision is that the Administration was to undertake greater efforts to place the Applicant in a suitable post than the writing of a few letters with no follow-up, and without ascertaining and documenting why the Applicant was unacceptable. The Tribunal recognizes that the Applicant had some responsibility for diligence in applying for vacancies for which he was qualified, and may not have discharged his responsibility as fully as he might have. However, the Tribunal finds that the 19 November 1991 decision called upon the Administration to do more than it did in the circumstances of this case, particularly in the absence of performance evaluation reports, which the Administration negligently failed to prepare.

X. This failure to implement in good faith the 19 November 1991 decision, as well as the delays in the case, constituted unfair treatment of the Applicant, engaging the responsibility of the Organization. Although the Applicant seeks reinstatement and extension of his fixed-term contracts until retirement age, the Tribunal does not consider such a remedy to be appropriate in the circumstances described above. For the injury sustained by the Applicant and having in mind the unusual history of this case, in

which the Applicant was remunerated for doing no work over a long period, the Tribunal fixes as compensation the amount of US$20,000.00.

XI. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant the amount of US$20,000.00.

XII. All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 22 July 1994

R. Maria VICIEN MILBURN
Executive Secretary